NOR ZAIRAWATHY ABD RAZAK v. KOSSAN LATEX INDUSTRIES (M) SDN BHD; MAJLIS PEGUAM (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID SALLEH J
[JUDICIAL REVIEW NO: WA-17D-2-01-2022]
26 JUNE 2023

Abstract – *A complaint against a solicitor to the Advocates & Solicitors Disciplinary Board would come to an end if the complaint was withdrawn by its complainant. However, if the withdrawal was done after the Disciplinary Board ('DB') has made its decision, then, the DB would be functus officio to either alter or set aside the decision. Therefore, the correct forum to entertain any appeal against the DB's decision in that instance would be the court, which would make its decision after determining whether there were cogent or real reasons to suspect on the bases of the withdrawal.*

LEGAL PROFESSION: *Proceedings – Disciplinary proceedings – Complaint against advocate and solicitor – Disciplinary Committee found solicitor guilty of dishonest and fraudulent conduct – Complainant withdrew complaint against solicitor after Disciplinary Board ('DB') made its order – Whether complaint brought to end – Whether DB functus officio to alter its order – Whether there were cogent or real reasons to suspect on bases of withdrawal – Whether court could set aside order by DB*

The appellant was a legal firm that had represented one 'Annamalai' ('vendor') in a sale and purchase agreement ('SPA') to sell a piece of land to the respondent company ('complainant'). Pursuant to the SPA, the appellant was required to hold a deposit sum in the amount of RM470,000 ('deposit sum') forwarded by the complainant in its client's account as a stakeholder. However, subsequently, unbeknown to the complainant and its solicitors, the appellant released part of the deposit sum to various beneficiaries as nominated by the vendor. Despite the payments made, the appellant *via* a letter to the complainant's solicitors, represented that it was still holding the deposit sum as stakeholder. Therefore, on a later date, other than demanding a refund of the deposit sum, the complainant also terminated the SPA on the ground that the vendor had failed to fulfil the conditions precedent of the SPA. A complaint was also lodged against the appellant to the Advocates & Solicitors Disciplinary Board. The appellant was found by the Disciplinary Committee ('DC') to have committed dishonesty and/or fraudulent conduct, beyond reasonable doubt, in the discharge of their duties when acting as solicitor for the vendor, for (i) releasing part of the deposit sum to the beneficiaries; and (ii) by informing the complainant's solicitors that it was still holding the deposit sum as stakeholder. The appellant's

A defence that they had released the monies innocently and due to the vendor's instructions was rejected. The DC then unanimously recommended the appellant to be struck off the roll. The Disciplinary Board ('DB') affirmed the DC's decision on the appellant's liability and after hearing the parties, the DB ordered the appellant to be suspended from practice as an advocate
B and solicitor for one year ('DB order'). Aggrieved by the DB's decision, the appellant filed the present appeal against the said decision under s. 103E of the Legal Profession Act 1976 ('LPA'). In support of the appeal, the appellant posited that the complainant had withdrawn their complaint against the appellant five days after the date of the DB order for the reason that the
C appellant had refunded the deposit sum together with interest to the complainant. Hence, the issue that arose was whether the withdrawal of the complaint by the complainant after a date the DB order was made would bring such complaint to an end.

Held (allowing appeal):

D **(1)** As per *Rosli Kamaruddin v. How Hock Sing & Anor*, the court must give effect to the withdrawal of the complaint, even if it was made after the DB order. Since the complainant had refused to take a stance on this appeal, the court could only conclude that there were no cogent or real reasons to suspect on the bases of the withdrawal. The question of
E misconduct or misrepresentation on the appellant therefore no longer arose. The DB order, hence, was set aside. (paras 33-36)

Case(s) referred to:
Rosli Kamaruddin v. How Hock Sing & Anor [2019] 1 CLJ 478 CA ***(refd)***
Sundaram v. Chew Choo Khoon [1968] 1 LNS 149 HC ***(refd)***

F **Legislation referred to:**
Legal Profession Act 1976, ss. 103E, 104E
Legal Profession (Disciplinary Proceedings) Rules 2017, rr. 8, 9
Rules Of Court 2012, O. 55 r. 2, O. 55A

G *For the applicant - Siti Noor Julaini Mohd Shahar & Shanmugananthan; M/s Julaini Shahar & Co*
For the respondent - Nur Muhaimin Mohd Husaimi & Aida Suhailah; M/s Joel & Mei
For the intervener - J Shamesh & N Kunaseelan; M/s Jeeva Partnership

Reported by Syamim Ariffin

H

JUDGMENT

Wan Ahmad Farid Salleh J:

[1] The appellant is at the material time practising as an advocate and
I solicitor in the name and style of Messrs Zaira & Co.

[2] The respondent company ("the complainant") entered into a sale and purchase agreement ("SPA") on 25 March 2013 with one MKA Annamalai Chettiar s/o Karuppan ("Annamalai") to purchase a piece of land known as Lot 5020, Mukim Kapar, Klang, Selangor ("the said land"). Annamalai ("the vendor") executed the SPA in his capacity as the administrator of the estate of one Marimuthu a/l Govindasamy, the registered owner of the said land.

[3] The agreed purchase price as reflected in the SPA is RM4,704,480.

[4] The complainant, through its solicitor's letter dated 18 February 2013, forwarded a sum of RM470,000 as a deposit ("the deposit") to the applicant.

[5] The SPA was conditional upon the vendor within six months from the date of the SPA obtaining an order to transfer the said land to the complainant. It is also subject to the removal of a private caveat lodged on the said land ("the said orders").

[6] The date on which the complainant's solicitors were to receive the certified true copies of the said orders would be treated as the unconditional date under cl. 1 of the SPA ("the unconditional date").

[7] Unbeknown to the complainant or its solicitors, the appellant, however, released part of the deposit to various beneficiaries nominated by Annamalai. A final payment was made to one Lourdesamy Santiago for RM261,360 on 18 July 2013.

[8] Despite the payments to various beneficiaries, the appellant, in a letter dated 7 January 2014, wrote to the complainant's solicitors to confirm that the firm still held the deposit sum as the stakeholder. The letter, *inter alia*, states as follows:

> We refer to the above matter and your letter dated 18/12/2013.
>
> We hereby confirmed [*sic*] that the deposit sum amounting [to] RM470,000 is held by us as [the] stakeholder.

[9] The complainant terminated the SPA by its letter dated 2 October 2017, alleging the failure on the part of Annamalai to fulfil the conditions precedent within the stipulated time. It also demanded a refund of the deposit together with interest.

[10] On the complaint lodged by the complainant, the Disciplinary Committee ("DC") found that the appellant was guilty of dishonest and/or fraudulent conduct in the discharge of her duties when acting as solicitor for the vendor in respect of the said land. According to the DC, the applicant's dishonesty resulted in the complainant being deprived of the return of the deposit in a timely manner.

[11] The findings on liability of the DC state are as follows:

> It is the unanimous finding of this DC that the Respondent is guilty of dishonest and/or fraudulent conduct in the discharge of her duties when acting as the Solicitor for the Vendor. The dishonesty being in the manner in which she dealt with the conveyancing file under her care in the attempted purchase of [the] said Land particulars GM 16679, Lot 5020, Mukim Kapar, District of Klang, State of Selangor involving the Complainant and the Vendor. The Respondent's dishonesty resulted in the Complainant being deprived of the return of the deposit of RM4,700,00.00 together with interest, in a timely manner and additionally, in the Complainant having to expend considerable time and monies to overcome the deception perpetrated by the Respondent as regards to the status of their deposit.

In short, the DC rejected the appellant's second written explanation that the monies were released on the instructions given by the vendor and that the appellant had innocently made the payment to the payees with the stated amount.

[12] The DC made a further finding that the appellant was dishonest, beyond a reasonable doubt, when she lulled the complainant into believing that the deposit was in her client's account and the SPA was still valid and subsisting when to her knowledge, the assertion was totally false.

[13] The DC then unanimously recommended for the appellant be struck off the roll.

[14] The Disciplinary Board ("DB") then affirmed the finding of the DC on the liability. However, the DB rejected the recommendation of the DC on the punishment for the appellant to be struck off the roll. Upon hearing the parties, the DB, instead, ordered the appellant to be suspended from practice as an advocate and solicitor ("the DB order"). The DB order, dated 8 January 2022, *inter alia* states as follows:

> It Is Hereby Ordered that the Respondent be suspended from practice as an Advocate and Solicitor of the High Court of Malaya for a period of one (1) year. The Disciplinary Board Hereby Further Ordered that the suspension is to take effect twenty one (21) days from the date of this Order and to expire on 28 January 2023.

[15] The DB order was served on the appellant on 19 January 2022.

[16] Aggrieved by the said decision of the DB, the appellant filed an appeal to this court under s. 103E of the Legal Profession Act 1976 ("LPA"). The appellant seeks for the DB order to be set aside.

[17] In an application in encl. 4, the appellant sought a stay of execution pending the disposal of the appeal against the DB order. On 5 October 2022, I allowed the application in encl. 4 with no order as to costs.

[18] By way of an application in encl. 12, the Bar Council sought leave to be allowed as an intervener in this OS. On 24 March 2022, I allowed the Bar Council's application.

The Originating Summons

[19] This originating summons ("OS") is supported by the affidavit of the appellant in encl. 2 ("AIS-2").

[20] The ground of the OS is anchored on the premise that the respondent had withdrawn the complaint against the appellant on 13 January 2022, five days after the DB order. The letter from the respondent's solicitors ("the withdrawal letter") and addressed to the DB *inter alia* states as follows:

> ... anak guam kami dengan rendah hati berhasrat untuk menarik balik aduan mereka yang difailkan di Lembaga Tatatertib Peguambela dan Peguamcara terhadap Responden [the appellant] melalui Nombor Aduan DC/17/1002 tersebut.
>
> Oleh yang demikian, kami melampirkan bersama-sama dengan surat ini satu (1) salinan Borang Penarikan Balik Aduan bertarikh 10.1.2022 yang di[tandatangani] oleh anak guam kami untuk perhatian dan tindakan lanjut pihak Tuan/Puan.

[21] It is not in dispute that the complaint was withdrawn because the appellant had refunded the deposit and interest to the respondent company. The refund was made on 30 June 2021. But it took about seven months for the respondent to withdraw the complaint against the appellant.

[22] Since the withdrawal of the complaint was made after the DB order, it goes without saying that at the time of the affirmation of liability and meting out the punishment, the DB was unaware of the withdrawal letter. The appellant submitted that had the withdrawal been made known earlier, the DB would have made a different order against the appellant.

[23] My attention was then drawn to the judgment of the Court of Appeal in *Rosli Kamaruddin v. How Hock Sing & Anor* [2019] 1 CLJ 478 CA. The case carries the general proposition that once a complaint is withdrawn, the DB must disband all inquiries relating to the withdrawn complaint.

Analysis

[24] Before me, learned counsel for the intervener rightly pointed out that the main issue to be determined in this OS is whether the withdrawal of the complaint by the respondent after the DB order would bring an end to the complaint. The Bar Council's position is that *Rosli Kamaruddin* ought to be distinguished from the instant case. In *Rosli Kamaruddin*, the complainant withdrew the complaint during the proceedings and not after the DB had made a decision.

[25] My attention was also drawn to r. 8 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ("the 2017 Rules"), which provides for the withdrawal of complaints. However, r. 8 of the 2017 Rules only relates to a withdrawal by the complainant "at any time before a final decision is made by the Disciplinary Board".

[26] The Bar Council, in its affidavit in reply in encl. 20 ("AIR-20") affirmed by Anand Raj a/l R Balasupramaniam, affirmed as follows:

> [7] Saya merujuk kepada perenggan 34 Afidavit Sokongan tersebut. Saya dinasihati oleh peguamcara pihak Pencelah dan menyatakan bahawa penarikan balik aduan oleh Responden tidak akan mengubah keputusan Lembaga Tatatertib disebabkan Lembaga Tatatertib telah mengesahkan penemuan liabiliti DC mengenai ketidakjujuran dan kelakuan fraud oleh Pemohon.
>
> [8] Saya juga telah dinasihati oleh Peguamcara pihak Pencelah dan sesungguhnya percaya bahawa walaupun penarikan balik dibuat oleh Responden, Perintah Muktamad yang dikeluarkan oleh Lembaga Tatatertib hanya boleh diketepikan oleh Mahkamah Yang Mulia ini dan Lembaga Tatatertib tidak mempunyai kuasa untuk meminda keputusannya.

[27] From the affirmation of Encik Anand Raj, who is the secretary to the Bar Council, it can be distilled that:

(i) the withdrawal of the complaint does not alter the DB order since, by then, the DB is already *functus officio*;

(ii) however, the DB's affirmation of the finding of liability by the DC in respect of the applicant's dishonesty and fraud remains;

(iii) since the DB is already *functus officio*, the DB order can only be set aside by this court.

[28] This brings me to the second issue raised by learned counsel for the Bar Council for this court to determine, which is whether the conduct of the appellant would amount to professional misconduct.

[29] The Bar Council's anxiety on the issue is understandable. The appellant had misrepresented to the respondent's solicitors that the deposit was still in the appellant's possession when in actual fact the whole sum had been disbursed on the instruction of the appellant's client.

[30] To begin with, this is an appeal under O. 55A of the Rules of Court 2012 ("ROC"). It is not a continuation of a judicial process. An appeal made under s. 104E of the LPA read together with O. 55A is an origination, hence the mode is by way of an OS; see *Sundaram v. Chew Choo Khoon* [1968] 1 LNS 149; [1968] 2 MLJ 40. In short, it is not an appeal from subordinate courts, which, according to O. 55 r. 2, is by way of a rehearing.

[31] Notwithstanding that this appeal is not by way of a rehearing, I have to take cognisance that the complaint against the appellant had been withdrawn. I also take note that at the hearing of this OS on 5 October 2022, learned counsel for the respondent intimated to the court that the respondent would not be taking any position on the OS.

[32] The Bar Council is also in a predicament. Had the withdrawal of the complaint took place during the proceedings at the DC or the DB, it could have intervened under r. 9 of the 2017 Rules. Since the DB had made the final order, it was too late for the Bar Council to intervene before the DB.

[33] Mary Lim JCA (now FCJ), in delivering the judgment of the Court of Appeal in *Rosli Kamaruddin*, held that:

> It is upon a complaint lodged that the DB and thence a DC will act. The DC will investigate, report its findings and make its recommendations to the DB. The moment a complaint is withdrawn, unless there are cogent and real reasons for the DB to suspect otherwise the reasons for the withdrawal, the DB must disband all inquiry relating to the withdrawn complaint. There is no residual power or anything akin to inherent power or retained jurisdiction on the part of the DB and certainly even less, in respect of the DC, to investigate, unless the DB itself lodges a fresh complaint on the same.

[34] As I alluded to earlier, I have to give effect to the withdrawal of the complaint, even if it is made after the DB order. Since the complainant refused to take a stance on this OS, I can only conclude that there are no cogent and real reasons for me to suspect on the bases of the withdrawal.

[35] The question of misconduct or misrepresentation on the appellant no longer arises once the complaint is withdrawn.

[36] The DB order is therefore set aside.

[37] However, I am making an order for the appellant to pay costs of RM10,000 to the Bar Council, subject to allocator.